Supreme Court, U. S.
FILED
APR 1 1980
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1339

THEODORE Q. CHILDS,

*Appellant,*

*against*

LUCY GANT CHILDS,

*Appellee.*

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT

## MOTION TO DISMISS THE APPEAL AND TO DENY CERTIORARI OR, IN THE ALTERNATIVE, TO AFFIRM

ROBERT ABRAMS
Attorney General of the
State of New York
*Attorney Pro Se,*
*Intervenor-Appellee*
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-7590

SHIRLEY ADELSON SIEGEL
Solicitor General

ROBERT J. SCHACK
Assistant Attorney General
*of Counsel*

## TABLE OF CONTENTS


PAGE

Preliminary Statement ..... 1

Statement of Facts ..... 2

Statutes Involved ..... 3

A. Federal Statutes ..... 3

28 U.S.C. § 1257. State courts; appeal, certiorari ..... 3

B. New York Statutes ..... 4

Domestic Relations Law § 237. Counsel fees and expenses ..... 4

Domestic Relations Law § 244. Enforcement by execution of judgment or order in action for divorce, separation or annulment 6

Family Court Act § 412. Husband's duty to support wife ..... 6

Family Court Act § 438. Counsel fees ..... 7

Civil Practice Law and Rules § 5601. Appeals to the court of appeals as of right 7

Civil Practice Law and Rules § 5602. Appeals to the court of appeals by permission ..... 8

POINT I—The appeal should be dismissed and certiorari denied because the order appealed from is not "final" within the meaning of 28 U.S.C. § 1257 since it contemplates further proceedings which may obviate the need for constitutional adjudication ..... 10

PAGE

POINT II—The appeal should be dismissed and certiorari denied since the questions presented are either insubstantial or require abstention ..... 13

POINT III—Assuming *arguendo* that probable jurisdiction is noted herein, the Court should affirm.. 17

Conclusion ..... 18

Appendix A—Attorney General's Brief II.C, *Childs* v. *Childs* (2d Dept) ..... 1a

C. Reexamination Of New York Legal History Shows That The Court May Fashion An Equitable Remedy Between The Parties .... 1a



Cases Cited

PAGE

*Alabama State Federation of Labor, Local No. 103* v. *McAdory*, 325 U.S. 450 (1945) ..... 12

*Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288 (1936) ..... 12

*Beazer* v. *New York City Transit Authority*, 440 U.S. 568 (1979) ..... 16

*Board of Trade* v. *Olsen*, 262 U.S. 1 (1923) ..... 12

*Califano* v. *Westcott*, 443 U.S. ——, 99 S. Ct. 2655 (1979) ..... 14

*Childs* v. *Appellate Division*, —— U.S. ——, 48 USLW 3436 (Jan. 7, 1980) ..... 3

*Childs* v. *Childs*, 440 U.S. 952 (1979) .....2, 13, 15, 17, 18

*Childs* v. *Childs*, 69 AD 2d 406 (2d Dept. 1979) ..2, 12, 15, 17, 18

*Costarelli* v. *Massachusetts*, 421 U.S. 193 (1975) .... 11

*Ex parte Park Sq. Automobile Station*, 244 U.S. 412 (1921) ..... 13

*Gallup* v. *Schmidt*, 183 U.S. 300 (1902) ..... 12

*Gorman* v. *Washington University*, 316 U.S. 98 (1942) 11

*Greschler* v. *Greschler*, 71 AD 2d 322 (2d Dept. 1979) .....15, 16

*Lebensfeld* v. *Lebensfeld*, —— A D 2d ——, 421 N.Y.S. 2d 615 (2d Dept. 1979) ..... 12

*Lynch* v. *United States*, 292 U.S. 571 (1934) ..... 12

*Matthews* v. *Huwe*, 269 U.S. 262 (1925) ..... 10

*Moore* v. *Sims*, —— U.S. ——, 99 S. Ct. 2371 (1979) 14

*Orr* v. *Orr*, 440 U.S. 268 (1979) .....2, 13, 14, 15, 16, 17

*Powers* v. *Porcelain Insulator Corp.*, 285 N.Y. 54 (1941) ..... 17

PAGE

*Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941) .....15, 16

*Republic Gas Co.* v. *Oklahoma*, 334 U.S. 62 (1948) ....11, 12

*Roberts* v. *Roberts*, 48 NY 2d 631 (1979) .....17, 18

*Stanton* v. *Stanton (I)*, 421 U.S. 7 (1975) ..... 14

*Stanton* v. *Stanton (II)*, 429 U.S. 501 (1977) ..... 14

*Tate* v. *Tate*, n.o.r., N.Y.L.J. April 2, 1979, at p. 11, col. 6 (N.Y. Co. Sup. Ct.), affd. —— AD 2d ——, 422 N.Y.S. 2d 709 (1st Dept. Dec. 18, 1979) ..... 16

*United States* v. *Herrera*, 584 F. 2d 1137 (2d Cir. 1978) ..... 12

*Wilcox* v. *Wilcox*, —— Misc 2d —— (Oswego Fam. Ct. Jan. 11, 1980) ..... 15

*Wilner* v. *United States*, 292 U.S. 571 (1934) ..... 12

STATUTES CITED

28 U.S.C. § 1257 .....1, 3, 10, 11

New York Domestic Relations Law (DRL),

§ 236 ..... 15
§ 237 .....4, 15, 16
§ 237(b) .....2, 11, 12, 14, 15, 16, 17
§ 244 .....2, 6, 11, 12, 14, 15, 16, 17

New York Civil Practice Law and Rules (CPLR),

§ 1012(b) ..... 2
§ 5601 .....2, 7, 10
§ 5601(b) ..... 10
§ 5601(c) ..... 9
§ 5601(d) ..... 10
§ 5602 ..... 8



PAGE

§ 5602(a)(1)(i) ..... 3, 10
§ 5602(b) ..... 3
§ 5602(b)(1) ..... 10

New York Executive Law, § 71 ..... 2

New York Family Court Act,

§ 412 ..... 6, 17
§ 438 ..... 7, 17

New York General Obligations Law (GOL),

§ 5-311 .....15, 16

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1339

THEODORE Q. CHILDS,

*Appellant,*

*against*

LUCY GANT CHILDS,

*Appellee.*

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT

## MOTION TO DISMISS THE APPEAL AND TO DENY CERTIORARI OR, IN THE ALTERNATIVE, TO AFFIRM

### Preliminary Statement

The Attorney General of the State of New York, Intervenor-Appellee herein, moves to dismiss the appeal and to deny certiorari or, in the alternative, to affirm the order of the Appellate Division, Second Department, on the grounds that the order appealed from is not final within the meaning of 28 U.S.C. § 1257,* that the questions raised are either not substantial or require abstention, and that, in any event, the appeal was correctly decided on the merits.

* The statute is set forth herein in the "Statutes Involved" section.

## Statement of Facts

This Court on March 5, 1979, in *Orr* v. *Orr,* 440 U.S. 268 (1979), held Alabama's alimony statutes invalid under the Equal Protection Clause for permitting awards only to wives after a financial fact-finding directed toward both spouses. Two weeks later, this Court remanded *Childs* v. *Childs,* 440 U.S. 952 (1979), to the Second Department of the Appellate Division of the Supreme Court of the State of New York "for further consideration in light of *Orr* v. *Orr*", *supra. Childs* involved an equal protection challenge to New York's Domestic Relations Law (DRL) § 237(b) which, literally read, authorizes counsel fee awards only to wives after a financial fact-finding directed to both husbands and wives.

On July 11, 1979, on such remand the Appellate Division rendered a decision in *Childs,* consolidated with other State appeals from orders entered therein, reported at 69 A D 2d 406 (1979). The Attorney General had intervened as a party in defense of the constitutionality of the State statutes involved pursuant to New York Civil Practice Law and Rules (CPLR) § 1012(b), Executive Law § 71. The Appellate Division upheld the constitutionality of DRL §§ 237(b) and 244* by reading them in tandem with other State statutes and in accordance with legislative intent to permit the award of counsel fees in matrimonial actions to husbands as well as to wives. The Appellate Division order remitted the proceeding to the trial court for a hearing at which appellant could apply for counsel fees. Appellant instead filed a Notice of Appeal to the New York Court of Appeals as of right under New York Civil Practice Law and Rules (CPLR) § 5601.* On October 9, 1979, the Court of Appeals dismissed the appeal because it was from a non-final order.

---

* The statutes are set forth herein in the "Statutes Involved" section.



On October 25, 1979, appellant moved in this Court for leave to file a petition for a writ of mandamus (*Childs* v. *Appellate Division,* No. 76-676). He alleged that the Appellate Division had failed to comply with this Court's mandate in vacating and remanding *Childs.*

On November 6, 1979, appellant moved in the Appellate Division for an order granting him leave to appeal to the Court of Appeals under § 5062(a)(1)(i) and/or § 5602(b)(1).* The motion was denied on December 3, 1979.

On January 7, 1980, this Court entered an order denying appellant's motion for leave to file a petition for mandamus. *Childs* v. *Appellate Division,* —— U.S. ——, 48 USLW 3436.

On February 19, 1980, appellant filed a Notice of Appeal to this Court from the Appellate Division's order of July 11, 1979.

On February 29, 1980, this Court docketed appellant's Jurisdictional Statement (hereinafter "J.S."). Pursuant to Rules 16 and 34 of the Court, the Attorney General has until March 30, 1980, to move to dismiss or affirm.

## Statutes Involved

### A. Federal Statutes

**28 U.S.C. § 1257. State courts; appeal; certiorari**

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

---

* The statutes are set forth herein in the "Statutes Involved" section.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

**B. New York Statutes**

**Domestic Relations Law § 237. Counsel fees and expenses.**

(a) In any action or proceeding brought (1) to annul a marriage or to declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, or (4) to declare the validity or nullity of a judgment of divorce rendered against the wife who was the defendant in any action outside the State of New York and did not appear therein where the wife asserts the nullity of such foreign judgment, or (5) by a wife to enjoin the prosecution in any other jurisdiction of an action for a divorce, or (6) upon any application to annul or modify an order for counsel fees and expenses made pursuant to this subdivision provided, the court may direct the husband, or where an action for annulment is maintained after the death of the husband may direct the person or persons maintaining the action, to pay such sum or sums of money directly to the wife's attorney to enable the wife to carry on or defend the action or proceeding as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the



respective parties. Such direction must be made in the final judgment in such action or proceeding, or by one or more orders from time to time before final judgment, or by both such order or orders and the final judgment. Upon application of the husband or the wife or the person or persons maintaining an action for annulment after the death of the husband, upon such notice to the other party and given in such manner as the court shall direct, the court may, in or before final judgment, annul or modify any such direction. Subject to the provisions of section two hundred forty-four of the domestic relations law the authority granted by the preceding sentence shall extend to unpaid sums or installments accrued prior to the application as well as to sums or installments to become due thereafter. Any applications for counsel fees and expenses may be maintained by the attorney for the wife in his own name in the same proceeding.

(b) Upon any application to annul or modify an order or judgment for alimony or for custody, visitation, or maintenance of a child, made as in section two hundred thirty-six or section two hundred forty provided, or upon any application by writ of habeas corpus or by petition and order to show cause concerning custody, visitation or maintenance of a child, the court may direct the husband or father to pay such sum or sums of money for the prosecution or the defense of the application or proceeding by the wife or mother as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties. With respect to any such application or proceeding, such direction may only be made in the order or judgment by which the particular application or proceeding is finally determined. Any applications for counsel fees and expenses may be maintained by the attorney for the wife in counsel's own name in the same proceeding.

**Domestic Relations Law § 244. Enforcement by execution of judgment or order in action for divorce, separation or annulment.**

Where the husband in an action for divorce, separation or annulment, or declaration of nullity of a void marriage, or a person other than the husband when an action for an annulment is maintained after the death of the husband, makes default in paying any sum of money as required by the judgment or order directing the payment thereof, the court in its discretion may make an order directing the entry of judgment for the amount of such arrears, or for such part thereof as justice requires having a regard to the circumstances of the respective parties, together with ten dollars costs and disbursements. The application for such order shall be upon such notice to the husband or other person as the court may direct. Such judgment may be enforced by execution or in any other manner provided by law for the collection of money judgments. The relief herein provided for is in addition to any and every other remedy, including, but not limited to the remedy provided pursuant to the provisions of section forty-nine-b of the personal property law, to which the wife may be entitled under the law; provided that when a judgment for such arrears or any part thereof shall have been entered pursuant to this section, such judgment shall thereafter not be subject to modification under the discretionary power granted by this section; and after the entry of such judgment the judgment creditor shall not hereafter be entitled to collect by any form of remedy any greater portion of such arrears than that represented by the judgment so entered.

**Family Court Act § 412. Husband's duty to support wife.**

A husband is chargeable with the support of his wife and, if possessed of sufficient means or able to earn such



means, may be required to pay for her support a fair and reasonable sum, as the court may determine, having due regard to the circumstances of the respective parties.

**Family Court Act § 438. Counsel fees.**

In any proceeding under this article by a wife or former wife, against her husband, or former husband, including proceedings for herself and her children, or by a person on behalf of children only, or at any hearing to modify or enforce an order entered in that proceeding or a proceeding by a husband or former husband to modify a decree of divorce, separation, or annulment, including an appeal under article ten the court may allow counsel fees at any stage of the proceeding, to the attorney representing the wife, former wife or person on behalf of children.

**Civil Practice Law and Rules § 5601. Appeals to the court of appeals as of right.**

(a) Dissent, reversal or modification. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division which finally determines the action, where (i) there is a dissent on a question of law in favor of the party taking such appeal, or (ii) such order directs a reversal of the judgment or order appealed from, or (iii) such order directs a modification thereof in a substantial respect, which is within the power of the court of appeals to review on such appeal, and the party taking the appeal is aggrieved by the modification.

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the

construction of the constitution of the State or of the United States; and

2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

(c) From order granting new trial or hearing, upon stipulation for judgment absolute. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

(d) Based upon non-final determination of appellate division. An appeal may be taken to the court of appeals as of right from a final judgment entered in a court of original instance or from a final determination of an administrative agency, or from an order of the appellate division which finally determines an appeal from such a judgment or determination, where the appellate division has made an order on a prior appeal in the action which necessarily affects the judgment or determination and which satisfies the requirements of subdivision (a) or of paragraph one of subdivision (b) except that of finality.

**Civil Practice and Rules § 5602. Appeals to the court of appeals by permission.**

(a) Permission of appellate division or court of appeals. An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application:



1. in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency,

(i) from an order of the appellate division which finally determines the action and which is not appealable as of right, or

(ii) from a final judgment of such court or final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601; and

2. in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers or a court or tribunal, from an order of the appellate division which does not finally determine such proceeding, except that the appellate division shall not grant permission to appeal from an order granting or affirming the granting of a new trial or hearing.

(b) Permission of appellate division. An appeal may be taken to the court of appeals by permission of the appellate division:

1. from an order of the appellate division which does not finally determine an action, except an order described in paragraph two of subdivision (a) or subparagraph (iii) of paragraph two of subdivision (b) of this section or in subdivision (c) of section 5601;

2. in an action originating in a court other than the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency,

(i) from an order of the appellate division which finally determines the action, and which is not appealable as of

right pursuant to paragraph one of subdivision (b) of section 5601, or

(ii) from a final judgment of such court or a final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601, or

(iii) from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

## POINT I

**The appeal should be dismissed and certiorari denied because the order appealed from is not "final" within the meaning of 28 USC § 1257 since it contemplates further proceedings which may obviate the need for constitutional adjudication.**

The order appealed from remanded this case for a new hearing at which both parties could apply for an award of counsel fees. Both the Court of Appeals and Appellate Division have held that order to be non-final.*

---

* It should be noted that appellant asserts that the order is final within the meaning of 28 U.S.C. § 1257. Assuming *arguendo* that he was correct, that claim places him in an inescapable dilemma. Following denial by the Court of Appeals of his appeal as of right under CPLR § 5601 and denial by the Appellate Division of his motion for leave to appeal under CPLR § 5602(a)(1)(i) and/or § 5602(b)(1), appellant still may move in the Court of Appeals itself under CPLR § 5601(a)(1)(i) for leave to appeal from a final order.

Appellant's situation is analogous to that of the petitioners for certiorari in *Matthews* v. *Huwe*, 269 U.S. 262, 266 (1925). In that case, the petitioners were "in a dilemma from which they cannot escape." If the jurisdictional ruling of the State's highest court on

*(footnote continued on following page)*



Under 28 U.S.C. § 1257, this Court may only entertain appeals or grant certiorari from "final judgments or decrees" of States courts. As this Court held in *Costarelli* v. *Massachusetts*, 421 U.S. 193, 196 (1975):

> "an important purpose of the requirement that we review only final judgments of highest available state courts is to prevent our interference with state proceedings when the underlying dispute may be otherwise resolved. Cf. *Republic Gas Co.* v. *Oklahoma*, 334 U.S. 62, 67 (1948); *Gorman* v. *Washington University*, 316 U.S. 98, 100-101 (1942)."

That requirement is particularly wise in a case such as this which asks the Court "to pass on constitutional issues before they have reached a definite stop", *Republic Gas Co.* v. *Oklahoma, supra*, 334 U.S. at 73. By virtue of the prior orders of this Court and the Appellate Division, there is no award outstanding against appellant for payment of counsel fees pursuant to DRL §§ 237(b) or 244. It also appears from appellant's own statements as to the financial means of the respective parties that no such order will result from the new hearing.

Appellant asserts (J.S. 11) that in 1976 his debts exceeded his assets and income while his former wife, appellee herein, "had assets of approximately $464,000.00."

---

*(footnote continued from preceding page)*

the appeal as of right was a ruling on the merits, then the petition for certiorari had to be taken from that ruling. But certiorari had been sought from the intermediate appellate court's decree. If the highest court's ruling on the appeal as of right was not on the merits, then the petitioners had to exhaust all their State remedies for review by applying to that court for permission to appeal. In either case, certiorari was improper.

So too here, if the Appellate Division's order is final, appellant must exhaust State avenues for appeal by moving in the Court of Appeals before applying to this Court. But if the Appellate Division's order is not final, it is not reviewable in this Court. In either case, review does not lie under 28 USC § 1257.

Under current case-law, it will be incumbent on appellee at the new hearing to show that she does not have sufficient funds with which to pay her attorney. If she fails to make such a showing, counsel fees must be denied. *Lebensfeld* v. *Lebensfeld,* —— A D 2d ——, 421 N.Y.S. 2d 615, 617 (2d Dept. 1979). Indeed, unless circumstances have radically changed, appellant may himself be entitled to an award of counsel fees pursuant to DRL § 237(b). See *Childs* v. *Childs, supra,* 69 A D 2d at 420.

It thus appears that upon conclusion of the new hearing, appellant will not be aggrieved, and may have been benefited, by the Appellate Division's order herein. He will therefore lack standing to complain of DRL §§ 237(b) and 244 as applied to himself. Since his rights will not have been "adversely affected by the operation of the statute", he will not then be heard to attack its constitutionality. *United States* v. *Herrera,* 584 F. 2d 1137, 1148 (2d Cir. 1978), citing *Alabama State Federation of Labor, Local No. 103* v. *McAdory,* 325 U.S. 450 (1945); *Lynch* v. *United States,* 292 U.S. 571 (1934); *Wilner* v. *United States,* 292 U.S. 571 (1934); *Board of Trade* v. *Olsen,* 262 U.S. 1 (1923); *Gallup* v. *Schmidt,* 183 U.S. 300 (1902).

The possibility exists, of course, that appellant will nonetheless be found liable for an award of counsel fees. At that time, his standing would be clear and he could then raise the constitutional issue on appeal to the highest State court and ultimately here. But the mere possibility that he

> "may be temporarily out of pocket, is not sufficient to warrant immediate review of an incomplete State judgment. Appellant, of course, has the burden of affirmatively establishing this Court's jurisdiction . . . The policy against premature constitutional adjudications demands that any doubts in maintaining this burden be resolved against jurisdiction." *Republic Gas Co.* v. *Oklahoma, supra,* 334 U.S. at 70-71, citing *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 341, 345, 348 (*Brandeis,* J., concurring).



The Attorney General submits that appellant has not carried his burden of showing why this Court should depart from its usual practice by accepting jurisdiction herein. Appellant's standing to challenge the constitutionality of the State statutes is dubious and the new hearing ordered may obviate the need to decide the constitutional issues. The appeal should therefore be dismissed and certiorari denied.

## POINT II

### The appeal should be dismissed and certiorari denied since the questions presented are either insubstantial or require abstention.

Appellant states five questions on this appeal (J.S. 9-10). The second is whether the Appellate Division violated this Court's mandate on remand. The other questions are restatements in four slightly different forms of appellant's contention that the Appellate Division could not constitutionally construe State matrimonial statutes as gender-neutral so as to render them constitutional in cases pending as of the date of this Court's decision in *Orr* v. *Orr, supra.*

As to appellant's second question, this Court's denial of his motion for leave to file a petition for a writ of mandamus is some indication* that it did not regard the Appellate Division's order as violative of its instructions on remand. Moreover, it is clear that the Appellate Division's "further consideration [of this proceeding] in light of *Orr* v. *Orr", supra,* complied with the literal language of this Court's order remanding *Childs* v. *Childs, supra,* 440 U.S. at 952, and with the intent of the Court in *Orr* v. *Orr,*

---

* The motion may have been decided on an alternative ground, pendency of the motion in the Appellate Division for leave to appeal to the Court of Appeals. See *Ex parte Park Sq. Automobile Station,* 244 U.S. 412, 414-5 (1921).

*supra.** There is thus no substantial federal question presented for this Court's review on this point.

Appellant further argues (J.S. 26) that reading DRL §§ 237(b) and 244 in a gender-neutral manner is barred under the United States and New York Constitutions as judicial legislation. However, the competence of courts under the United States Constitution to uphold statutes by reading them in a gender-neutral fashion has been presumed by this Court in many cases. See *Califano* v. *Westcott,* 443 U.S. ——, 99 S. Ct. 2655, 2663-4 (1979) (collecting cases); *Orr* v. *Orr, supra,* 440 U.S. at 272. It does not present a substantial federal question for this Court's review.

While there may be some question as to the permissibility of such readings of matrimonial statutes under the New York Constitution, that is a matter upon which New York's own highest court should pass before this Court does. Its proper resolution may involve a radical revaluation of New York's constitutional history, reaching back to the early 1600's. See Attorney General's Brief, Point II.C, *Childs* v. *Childs* (2d Dept.).**

This Court held that the federal trial court should have abstained in *Moore* v. *Sims,* —— U.S. ——, 99 S. Ct. 2371, 2380 (1979), in part because

> "State courts are the principal expositors of state law."

---

* The *Orr* Court noted, 440 U.S. at 272, that State alimony laws could be amended to be gender-neutral by legislative action, but it also suggested judicial reinterpretation of the laws by citing *Stanton* v. *Stanton* (I), 421 U.S. 7 (1975). On its second hearing of the *Stanton* case, this Court specifically read its first decision to require a State's highest court to apply its statute in a gender-neutral manner by reading it in light of the common law or recent legislative intent. *Stanton* v. *Stanton* (II), 429 U.S. 501, 504 n. 4 (1977).

** That portion of the Attorney General's Brief below is set forth herein as Appendix "A."



In this appeal, abstention is even more appropriate inasmuch as the question goes to the power of a New York court under its own Constitution to exposit its own statutes. See *Railroad Commission* v. *Pullman Co.,* 312 U.S. 496, 500-501 (1941). It is the quintessence of a State matter from which the Federal courts should abstain.

Appellant also argues (J.S. 27-28, 33-36) that even if the Appellate Division had the power to reinterpret New York's statutes, it did so incorrectly herein. But New York's highest court, the Court of Appeals, has not yet ruled on the proper reading of New York's matrimonial laws since *Orr* v. *Orr, supra.* Whether it will read DRL §§ 237 and 244 as gender-neutral is still unclear. Compare *Childs* v. *Childs, supra,* 69 A D 2d at 418-20 (upholding DRL §§ 237(b) and 244 under a gender-neutral reading), with *Greschler* v. *Greschler,* 71 A D 2d 322, 327-9 (2d Dept. 1979) (holding that General Obligations Law (GOL) § 5-311, imposing greater limitations on wives than husbands in separation agreements, cannot be read in a gender-neutral manner and is unconstitutional); *Wilcox* v. *Wilcox,* —— Misc 2d —— (Oswego Fam. Ct. Jan. 11, 1980) (holding that DRL § 236 cannot be read in a gender-neutral manner and is unconstitutional). Under this Court's usual abstention rules, see *Railroad Commission* v. *Pullman Co., supra,* New York's highest court should be given an opportunity to construe the State's statutes before this Court rules on their proper interpretation.

Appellant finally challenges the application of a gender-neutral reading to his case because the statute was not so read at the time of the original counsel fee award and was therefore void *ab initio* (J.S. 31-32, 37-38). This Court has already clearly indicated that State courts may limit *Orr* v. *Orr, supra,* 440 U.S. at 275 & n. 4-5, to prospective effect. The extent of *Orr's* applicability to pending cases in New York is still unclear. Compare *Childs* v. *Childs, supra,* 69 A D 2d at 420 (not retroactive with respect to

DRL §§ 237 and 244); *Tate* v. *Tate,* n.o.r., N.Y.L.J. April 2, 1979, at p. 11, col. 6 (N.Y. Co. Sup. Ct.), *aff'd.* —— A D 2d ——, 422 N.Y.S. 2d 709 (1st Dept. Dec. 18, 1979) (not retroactive with respect to GOL § 5-311), with *Greschler* v. *Greschler, supra,* 71 A D 2d at 329 (retroactive with respect to GOL § 5-311). The Court of Appeals has not ruled on the issue of the retroactivity of *Orr* v. *Orr, supra.*

Since this Court has committed the question of retroactivity to the State courts, and since New York's highest court has not yet ruled on whether the statutes can be read in a gender-neutral manner at all, much less retroactively, the Court should abstain from ruling on it at this time. Cf. *Railroad Commission* v. *Pullman Co., supra.*

This Court has repeatedly held that Federal courts should not reach out to decide constitutional questions when a statutory ground of decision exists. *Beazer* v. *New York City Transit Authority,* 440 U.S. 568, 582 & n. 22 (1979). In the present case, a decision that DRL §§ 237(b) and 244 cannot be read in a gender-neutral manner would obviate the need to reach any other issues herein. Since Federal abstention from the question of State statutory construction is mandatory, this Court should abstain from rendering an advisory opinion on further questions that might not have to be reached.

In sum, abstention is mandatory from the questions appellant raises as to the Appellate Division's powers under the New York Constitution to read statutes in a gender-neutral manner, the correctness of that interpretation, and its retroactivity. Since decision thereon might obviate reaching appellant's other questions as to the Appellate Division's compliance with this Court's order on remand herein or as to the Appellate Division's powers under the federal Constitution to interpret State statutes in a gender-neutral manner, the Court should likewise abstain from those questions. In any event, they do not present substantial federal questions for this Court's review.



## POINT III

**Assuming *arguendo* that probable jurisdiction is noted herein, the Court should affirm.**

Assuming *arguendo* that probable jurisdiction is found by this Court, the Court should affirm for the reasons hereinafter discussed.

Reviewing the questions appellant raises, it is clear that the Appellate Division fully complied with this Court's mandate to consider this case further in light of *Orr* v. *Orr, supra.* See pp. 13-14, *supra.* It is also clear that the Appellate Division had the power under the United States Constitution to read State matrimonial statutes in a gender-neutral manner. See p. 14, *supra.*

Although New York's Court of Appeals has not passed directly on appellant's objections to the Appellate Division's power to read DRL §§ 237(b) and 244 in a gender-neutral manner, to the interpretation itself, and to its application to pending cases, some indication that it would approve of the Appellate Division's decision in *Childs* v. *Childs, supra,* may be found in its jurisdictional ruling two months later on the appeal in *Roberts* v. *Roberts,* 48 N Y 2d 631 (1979). Appellant therein challenged analogous statutes, Family Court Act §§ 412 and 438,* authorizing counsel fees to the wife only in a support proceeding. The Court of Appeals denied direct appeal as of right to it from the trial court on the constitutional issues, citing *Powers* v. *Porcelain Insulator Corp.,* 285 N.Y. 54 (1941). Under the latter case, the Court of Appeals had held that a direct appeal does not lie

> "if in order to reach a decision on the merits it is necessary to pass upon some question other than the constitutionality of a statute, as, for example, a question of statutory construction", 285 N.Y. at 57.

---

* The statutes are set forth herein in the "Statutes Involved" section.

While the Court of Appeals' jurisdictional ruling does not amount to a ruling on the merits and does not remove the need for abstention herein (see pp. 14-16, *supra*), assuming *arguendo* that the issues were reached, the jurisdictional ruling in *Roberts* v. *Roberts, supra,* suggests that the Court of Appeals would not find the Appellate Division's approach in *Childs* v. *Childs, supra,* to be repugnant to the Federal or State Constitutions or to the State's statutes.

Appellant raised below the same arguments that he asserts now. The Appellate Division's scholarly opinion contains ample authority for that Court's powers to read the statutes challenged herein with others *in pari materia* and in accordance with legislative intent as gender-neutral and to apply that reading to pending cases. *Childs* v. *Childs, supra,* 69 A D 2d at 418-20. Should the issues be reached by this Court, the order below should therefore be affirmed on the opinion of the Appellate Division.

## CONCLUSION

**The appeal should be dismissed and certiorari denied. In the alternative, the order should be affirmed on the opinion below.**

Dated: New York, New York
March 28, 1980

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
*Attorney Pro Se,*
*Intervenor-Appellee*

SHIRLEY ADELSON SIEGEL
Solicitor General

ROBERT J. SCHACK
Assistant Attorney General
*of Counsel*



# APPENDIX A

## Attorney General's Brief, Point II.C, *Childs* v. *Childs* (2d Dept.).

### C. Reexamination Of New York Legal History Shows That The Court May Fashion An Equitable Remedy Between The Parties.

One of the major factors militating *against* a liberal reading of the State's alimony and counsel fee laws has been the widely expressed view that these subjects are purely statutory in New York and not part of the common law. See, e.g., *Steinberg* v. *Steinberg,* 46 A D 2d 684 (2d Dept. 1974), app. dsmd. 36 N Y 2d 690 (1975); Foster and Freed, "Orr v. Orr and the Counterrevolution," N.Y.L.J. March 13, 1979, p. 1, col. 1, at p. 5, col. 4; N.Y. Statutes § 4, at 30 (McKinney 1971). The assumption is that if New York were not restricted to statutory sources, it would "have a reserve of equitable principles to call upon in order to supplement [matrimonial] statutes. . . ." Foster and Freed, *supra,* at 5, col. 4.

Closer investigation shows that the asserted lack of equitable jurisdiction in divorce cases does not appear to have been critically reviewed by the appellate courts in this century. The Attorney General respectfully submits that legal research published after the decisions stating that proposition shows it to be incorrect.

Our analysis indicates that New York courts can refer to English common law precedents on divorce to make alimony, support and counsel fee awards. It is true that the common law did not provide for such awards for husbands, Poynter, *Concise View of the Doctrine and Practice of the Ecclesiastical Courts in Doctors' Commons on Various Points Relevant to the Subject of Marriage and Divorce,* 252 *et seq.* (2d Ed. 1824). Once equitable jurisdiction has been found, the Courts can expand the common law to reach new conditions, furnishing new remedies to avoid

gross injustice. See, e.g., *Piper* v. *Hoard,* 107 N.Y. 73, 82 (1887); *Schwartz* v. *Lubin,* 6 A D 2d 108, 111 (1st Dept. 1958); *Amsden* v. *Amsden,* 202 Misc. 391, 393 (Monroe Sup. 1952); *Morris* v. *Morris,* 138 Misc. 682, 686-7 (Schenectady Sup. 1930), affd. 234 A.D. 187 (3d Dept. 1931), affd. 260 N.Y. 650 (1932). So, too, in this case the Courts can avoid gross injustice to wives by using their equitable powers to read the statutes to do justice between both parties by allowing awards to either husbands or wives, as the circumstances of the particular cases demand.

The Constitution of New York of 1894, as amended, provides now, art. I, § 14, as each prior Constitution has provided, Const. 1846, Art. I, § 17; Const. 1821, Art. 7, § 13; Const. 1777, Art. 35, that

> "Such parts of the common law, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony, on the nineteenth day of April, one thousand seven hundred seventy-five, . . . shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same. But all such parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this constitution, are hereby abrogated."

In determining "that the law of England concerning divorces and matrimonial causes, was never adopted in the colony of New York", *Burtis* v. *Burtis,* 1 Hopk. 564 (Ct. Chanc. 1825), Chancellor Sandford laid emphasis on the fact that before the Revolution only four divorces had ever been granted in New York and only by one colonial governor and council, that no colonial law was ever enacted



for divorce, that no colonial court was explicitly granted such jurisdiction, and that no colonial court ever exercised such jurisdiction. Thus, he argued, the common law on matrimonial actions "was not adopted in fact or in practice, and it was never the law of the colony . . . [and] did not become the law of the state." *Id.,* 1 Hopk. at 564-5. Even if the common law had been in force, the Chancellor argued, it would be repugnant to the statutory scheme for divorce established by the Legislature because it would give the courts jurisdiction to grant divorces for causes the Legislature had not chosen to recognize. *Id.,* 1 Hopk. at 566.

Chancellor Sandford's determination has repeatedly been relied on thereafter as the basis for holding that New York courts have only such power over divorces as is granted by statute. See, e.g., Kent, *Commentaries,* vol. 2, at 97 (1826); *Erkenbrach* v. *Erkenbrach,* 96 N Y 456, 464 (1884). It should be noted, however, that Chancellor Sandford did not himself establish such a broad proposition because he affirmed the jurisdiction of courts of equity to vacate marital contracts obtained through fraud. *Burtis* v. *Burtis, supra,* 1 Hopk. at 567-8; *Ferlat* v. *Gojon,* 1 Hopk. 478, 494-5 (1825).

Moreover, three of the four factual findings for his holding that English divorce law had not been adopted in New York are clearly wrong. There were more divorces than he reported.* There were also colonial laws for divorce

---

* The four divorces that the Chancellor had found to be extraordinary acts by one governor, standing alone in the history of the colony, *Burtis* v. *Burtis, supra,* 1 Hopk. at 564, were in fact at least six in number, by at least two governors, and were issued by the governors sitting with their councils as courts to hear charges and render judgments. See Chester, *Legal and Judicial History of New York,* 316-8 (1911).

and courts with divorce jurisdiction of which he apparently was not aware.*

It is not even clear that he was correct in asserting that the common law of matrimony had fallen into disuse at the time of the Revolution. Certainly, Chancellor Kent, who was older than Chancellor Sandford and more likely to have been aware of the actual practice fifty years before, at one time believed that it *was* a vital part of the colony's common law and, therefore, supplemented the new state's statutes. See, e.g., *Wightman* v. *Wightman,* 4 Johns. Ch. 343, 346-7 (1820); *Aymar* v. *Roff,* 3 Johns. Ch. 50 (1817). Chancellor Kent appears later to have changed his views, *Commentaries,* vol. 2, at 97, but he did so, *id,* at 96, in reliance on *Burtis,* not on his own knowledge of conditions at the time of the Revolution.

But whether that part of the common law was being actively relied upon does not affect its incorporation in New York law. In determining whether English common law became part of New York law, the Court of Appeals has noted that the lack of reported decisions is not persuasive because even important common law principles

---

* The Burgher Courts of the Colony of New Amsterdam which were for a time continued in existence after the English took control in 1664 had jurisdiction over separation of man and wife. They had the power to make orders for the division of property and the custody of children. Chester, *Courts and Lawyers of New York,* 137 *et seq.* (1925), citing Daly, *History of the Bench and Bar of New York* (1897). Moreover, at least one court established by the Colony of New York had limited divorce jurisdiction. The Court of Chancery established in 1683, 1 Colonial Laws 125, 128 [Chap. 7, L. 1683], had "power to heare and determine all matters of Equity. . . ." The Governor and his Council formed a High Court of Chancery for appeals, but delegated their authority to the "Chancellour." In 1684 the High Court was given jurisdiction to annul a marriage when a person had remarried believing his or her spouse dead following a five-year absence on a foreign trip. 1 Colonial Laws 150, 151 [Chap. 10, L. 1684]. The grant of equity jurisdiction was continued when the colonial courts were settled in 1691. 1 Colonial Laws 226, 230 [Chap. 4, L. 1691].



were not always published. *Waters & Co.* v. *Gerard,* 189 N.Y. 302, 314 (1907). In the case cited, the Court accepted as part of New York's common law heritage an inn-keeper's lien on a guest's possessions which were the property of a third person. It did so despite the fact that there was no New York statute or case law precedent for such a lien prior to the Revolution and only four reported English cases, dating from 1612, 1617 and 1703. *Id.,* at 313, 316-7. Once a common law principle was stated, it became part of New York law, even if it was not clear that it was still in use at the time of the Revolution, so long as it was "applicable to our conditions" and was not "abrogated or modified by express constitutional or statutory enactments." *Id.,* at 309.

In arguing that the common law of matrimony did become part of this State's law, the Attorney General does not suggest that the cases which have stated the contrary should be over-ruled. Rather, those statements should be recognized as dicta and the decisions restricted more closely to the situations before the courts. As Chancellors Kent and Sandford recognized New York courts inherited from the common law the power to declare marriages absolutely void, even in the absence of a statute. *Perry* v. *Perry,* 2 Paige Ch. 501, 506 (1831); *Burtis* v. *Burtis, supra; Ferlat* v. *Gojon, supra; Wightman* v. *Wightman, supra.* After the Legislature had acted, however, to specify which marriages *de facto* could be dissolved by the courts and on what grounds, Chap. 69, L. 1787, the common law grounds for such divorces were no longer consistent with the statutory scheme and could not be applied. *Perry* v. *Perry, supra,* 2 Paige Ch. at 506, *Burtis* v. *Burtis, supra,* 1 Hopk. at 565-8.

But as to the incidental effects of divorce, such as alimony, support and counsel fees, the Legislature never took hold of the entire area in such a way as to erase the Court's equitable jurisdiction over the subject matter. Indeed, when the Legislature at first granted husbands "the same rights . . . and . . . the same relief for the like causes

as femes convert," Chap. 205, L. 1824, § 12, and later removed it, Revised Statutes, Pt. 2, Chap. 8, Tit. 1, §§ 45, 54, it did not explicitly state that support could not be awarded.

Other states where the common law is applicable have held that such incidental awards may be made unless forbidden by statute. See, e.g., *Beal* v. *Beal,* 388 A. 2d 72, 76 (Me. Sup. 1978); *Killingsworth* v. *Killingsworth,* 284 Ala. 524, 226 So. 2d 308, 313 (Sup. 1969). New York can likewise in the exercise of its equity jurisdiction mold common law principles to meet today's conditions, as argued above, by reading DRL §§ 236-237 to permit awards of alimony or counsel fees to a husband in an appropriate case. *Thaler* v. *Thaler, supra.* Such a reading would permit the Court to uphold the statute under the rationale of *Orr,* pending legislative action.